In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 436

NORFOLK DREDGING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's claim arises out of its contract with the Corps of Engineers to build the Craney Island Disposal Area at Hampton Roads, Virginia. The project required the building of six miles of levee in tidal waters. Petitioner was to be paid $0.26 per cubic yard of fill used on the job, with the proviso that any material deposited beyond the required dimensions of the levee would be deducted. This controversy arises because the deductions were greater than petitioner expected.

The fill was conveyed to the levee site through pipelines. The initial technique used was known as the "fixed shore pipeline": a single pipeline, or parallel lines, resting on the portion of the levee already constructed, would discharge the fill. However, this technique proved unsatisfactory as the levee reached areas where the bottom consisted of fine, soft marine clay. At that point, the fill settled into the clay to depths of around 30 feet, displacing and upheaving the bottom in large "mud waves." This caused a large amount of the fill to settle outside the required dimensions of the levee.

Petitioner solved this problem by discharging the fill through a pipeline floating on pontoons. This pipeline was swung back and forth as the fill discharged, achieving a more even and gradual dispersion. When this technique was put into effect, the excessive settlement of fill immediately ceased. However, deductions which petitioner considered to be excessive continued, since fill continued to be deposited outside the required dimensions for the levee. When the levee was finally completed, 7.9 million cubic yards of fill had been used, which was close to the parties' estimate. However, 2.1 million yards were deposited outside the required dimensions and an appropriate deduction was accordingly made in the amount paid petitioner.

Petitioner made an administrative claim for approximately $600,000, representing (i) the amount which had been deducted from the contract price by reason of deposit of fill outside the required dimensions of the levee, and (ii) the costs of using the float-

ing pipeline rather than the fixed shore pipeline. The contracting officer, on direction from the Corps of Engineers Board of Contract Appeals, awarded $75,000 to compensate petitioner for the fact that a smaller quantity of fill than was estimated remained within the contract dimensions of the levee. In other respects, petitioner's claim was denied administratively. The Court of Claims held that the administrative decision was supported by substantial evidence and was not arbitrary or unreasonable.

Petitioner contends that the fixed-shore-pipeline method of discharging the fill was required by the government-drafted specifications, and that accordingly the United States should be responsible for the fact that this method proved unsatisfactory. However, the Board of Contract Appeals and the Court of Claims found that the relevant specification [1] allowed the contractor considerable latitude as to method, and did not prohibit the floating-pipeline method. 360 F. 2d 619, 624-26 (Pet. App. 9-12). Thus the Court of Claims correctly held that under this contract "it was the plaintiff's responsibility to employ the tool *best suited* to accomplish the required ends and to assume the risks attending the undertaking." 360 F. 2d at 628 (Pet. App. 16).

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[1] Specification TP 1-04a(3) provided (Pet. App. B, p. 31):

> The hydraulic filling shall be conducted in such a manner as to achieve a gradual building up of the base of the fill by the use of parallel discharge lines or by lateral shifting of a single discharge line. In no case shall the levee be pumped to full height with steep side slopes and allowed to slump.

The Court of Claims was also correct in ruling that petitioner assumed the risk of failure of the fill to stay within the required dimensions by reason of "the interaction of such factors as the conglomerate nature of the fill, method of placement, variations in the bottom material, waywardness of tidal currents, and impact of storms * * *." 360 F. 2d at 633 (Pet. App. 26). The court pointed out that "[a]s an experienced operator in the dredging business and in the particular coastal area which included Hampton Roads, the plaintiff is charged with awareness of the inherent difficulties in erecting with hydraulic fill a six-mile levee into tidal waters in an area where violent storms, strong currents, and heavy seas are a common occurrence." 360 F. 2d at 628 (Pet. App. 16). Since these hazards were foreseeable, and there was no showing of anything in the contract leading petitioner to believe that these hazards would not be encountered, petitioner is not entitled to compensation for "changed conditions."[2] Moreover, as the court pointed out (Pet. App. 26), the contract specifically provided that deduction from the contract price would be made on account of material outside the contract dimensions "whether it is the result of wash due to

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[2] The Changed Conditions clause (Pet. App. 30), provides for compensation for increased costs resulting from "(1) subsurface or latent physical conditions at the site differing materially from those indicated in [the] contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. * * *"

normal pumping operations, mud waves which are beyond the control of the Contractor *or any other causes whatsoever* * * *." (Pet. App. 32).

Petitioner was fully aware of the risks inherent in the unique Craney Island project when it submitted its bid. Its claims have been thoroughly reviewed by a contracting officer, the Corps of Engineers Board of Contract Appeals, and by the Court of Claims. There is nothing in the case which would warrant further review by this Court.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966.

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